

**IN THE MATTER OF AN APPLICATION BY DR. CURTIS WALL TO COUNCIL
TO VARY THE PENALTIES ORDER OF A HEARING TRIBUNAL
OF THE COLLEGE OF CHIROPRACTORS OF ALBERTA**

**pursuant to SECTION 93 of the *HEALTH PROFESSIONS ACT*,
being Chapter H-7 of the Revised Statutes of Alberta**

**NOTICE OF APPLICATION TO VARY ORDER PURSUANT TO
SECTION 93 OF THE *HEALTH PROFESSIONS ACT***

Blair E. Maxston, KC
Stillman LLP
Counsel for the Complaints Director
College of Chiropractors of Alberta
100, 17420 Stony Plain Road
Edmonton, AB T5S 1K6
Direct: 780-641-0542
Email: bmaxston@stillmanllp.com

James SM Kitchen
Barrister & Solicitor
Counsel for Dr. Curtis Wall

7070e Farrell Rd SE, #1063
Calgary, AB T2H 0T2
Direct: 587-330-0893
Email: james@jismklaw.ca

I. OVERVIEW

1. Dr. Wall (the “Member”) herein applies to the council of the College of Chiropractors of Alberta (“Council”) to vary the fines and costs order (“Penalties Order”) of a hearing tribunal pursuant to section 93 of the *Health Professions Act*.

II. BACKGROUND

2. On August 14, 2023, the Member received a “penalties and costs” decision (“Decision 2”) of a hearing tribunal assessing fines and costs against him. Decision 2 was the result of an earlier decision assessing liability for alleged unprofessional conduct (“Decision 1”). Many aspects of both Decision 1 and Decision 2 were directly based on invalid CMOH orders (the “Invalid CMOH Orders”). All other aspects of both Decision 1 and Decision 2 were indirectly based on the Invalid CMOH Orders.

III. BASIS FOR VARYING THE PENALTIES ORDER

A. The Council must vary the fines portions of the Penalties Order that are based on the Invalid CMOH Orders

3. Section 93 of the *HPA* states: “If the time for filing an appeal under this Part has passed or due to a change in circumstances an order under this Part is impossible to carry out, the person to whom the order is directed or the complaints director may apply to the council for a variation of the order”. The references to “this Part” and “order” are references to *HPA* Part 4: Professional Conduct (section 54-96.2), which describes the kinds of orders made by hearing tribunals that adjudicate allegations of unprofessional conduct.
4. The Council must exercise its authority pursuant to section 93 of the *HPA* to vary the Penalties Order premised on the Invalid CMOH Orders. Hearing tribunal orders that no longer have any basis in law must not be enforced and therefore must be varied to avoid a miscarriage of justice.
5. The Alberta COVID-related CMOH Orders—all of them—are void *ab initio* as a result of *Ingram v Alberta (Chief Medical Officer of Health)*, [2023 ABKB 453](#) [*Ingram*]. All rules, orders, directives, pronouncements, requirements, and regulations based on or

stemming from the Invalid CMOH Orders are therefore also of no force or effect, including the College's Pandemic Directive, because the legal substratum of the Directive is the Invalid CMOH Orders.

6. Many of the findings of unprofessional conduct of the hearing tribunal in Decision 1 have as their sole legal basis the Invalid CMOH Orders; the associated order—the Penalties Order—must therefore be varied.
7. The aforementioned findings were associated with the following charges, each of which was in turn attached to or associated with a fine and a portion of costs in the Penalties Order:
 - a. Charges 1(b), 1(c), and 1(d);
 - b. Charges 2(b) and 2(c);
 - c. Charge 3(b);
 - d. Charge 4(c); and
 - e. Charge 5(a).
8. As mentioned, insofar as the College's Pandemic Directive is premised upon or found its basis in the Invalid CMOH Orders, it too cannot be relied upon for the enforcement of the Penalties Order. Placing that to the side, however, the College's Pandemic Directive did not prohibit chiropractors from permitting their patients to not wear masks. The only legal instrument that required the Member to require his patients to wear masks was a January 5, 2021 AHS "Reopen Order" (the "Reopen Order"). The Reopen Order is also invalid as a result of *Ingram* because the only lawful basis or legal substratum for the Reopen Order was the Invalid CMOH Orders. Therefore, there was at no material time any lawful requirement that the Member require his patients to wear masks.
9. The Pandemic Directive also did not require that members or their staff observe two metres of social distancing while unmasked, or that Members have a Plexiglas barrier at the clinic reception. Only the Invalid CMOH Orders and any guidance or regulations predicated thereupon required these things.

10. Neither was “fail[ing] to follow the Chief Medical Officer of Health Orders regarding masking and COVID-19”, on which Charge 5(a) was premised, made out. Plainly, the associated fines and costs must be varied.

B. The Council must vary the fines portions of the Penalties Order that are based neither on valid public health orders nor on College directives

11. College directives premised upon, flowing from, and legitimized exclusively by invalid government public health orders are not capable of supporting charges or fines connected thereto. But even if the College’s Pandemic Directive were capable of standing independent of the Invalid CMOH Orders, that would fail to legitimize the fines attached to Charges 3 and 4, because those charges were based on nothing at all, by the hearing tribunal’s own admission. For further certainty, the hearing tribunal was clear on the point that the conduct reflected in Charges 3 and 4 was not in contravention of any College directive. Accordingly, the Charge 3 and Charge 4 fines not eliminated by virtue of the Invalid CMOH Orders are eliminated by virtue of being untethered to anything at all.

C. The Council must vary the fines portions of the Penalties Order that are based on the Pandemic Directive which is itself based on Invalid CMOH Orders

12. The language of the Pandemic Directive makes clear that it flowed from the Invalid CMOH Orders.

13. The Pandemic Directive’s introductory statement admits of a directive hinging entirely on the invalidated public health orders:

The **Government of Alberta** introduced plans to “**Re-Open Alberta**” on April 30, 2020. **This directive defines the requirements chiropractors must follow to ensure safe practice with pandemic public health measures as a result of COVID-19.** [Emphasis added.]

14. Additionally, throughout its text, the Pandemic Directive contains no less than two dozen references to the “CMOH”, “Government of Alberta”, “government”, “civil orders”, “external stakeholders”, “Chief Medical Officer of Health”, “Re-Open Alberta”, “Public Health” and “Ministry of Health”. The Pandemic Directive also makes the following explicit statements:

- “In the event of a discrepancy between this information and the directives of provincial public health authorities, the directions of the provincial public health authority take precedence”;
- “Follow all mandates and recommendations from Public Health and the Government of Alberta regarding your personal and professional conduct. As a regulated health professional, you have a fiduciary responsibility to follow all civil orders that originate from any level of government”;
- “The ACAC continues to consult with external stakeholders, including the Ministry of Health and the Chief Medical Officer of Health (CMOH) and will adapt this directive based on expert recommendations”;
- “[C]hiropractors are directed to stay up to date with the directives of the CMOH”.

15. The remaining charges, being Charges 1(a), 2(a) and 5(b), flowed either from the Pandemic Directive that found its basis and legitimacy in the Invalid CMOH Orders, or flowed indirectly from the Invalid CMOH Orders by some other means.

16. Nothing with which the Member was charged failed to be somehow tethered to the Invalid CMOH Orders, unless it was tethered to nothing at all, as in the case of some sub-charges of Charges 3 and 4.

17. It is unlawful, and therefore “impossible”, to enforce the payment of fines and costs based on findings of unprofessional conduct that are themselves based on invalidated laws. Therefore, the fines must be varied as follows:

- a. The \$4,000 fine imposed by the Penalties Order regarding Charge 1 must be varied as follows:

The portion of fines for Charges 1(b), 1(c) and 1(d)—the charges based *directly* on the Invalid CMOH Orders—must be varied to \$0, and the portion of fines for Charge 1(a)—the charge *indirectly* based on the Invalid CMOH Orders, which is to say the Pandemic Directive flowing therefrom—must be varied to \$0.

- b. The \$4,000 fine imposed by the Penalties Order regarding Charge 2 must be varied as follows:

The portion of fines for Charges 2(b) and 2(c)—the charges based *directly* on the Invalid CMOH Orders—must be varied to \$0, and the portion of fines for Charge 2(a)—the charge *indirectly* based on the Invalid CMOH Orders, which is to say the Pandemic Directive flowing therefrom—must be varied to \$0.

- c. The \$1,000 fine imposed by the Penalties Order regarding Charge 3 must be varied as follows:

The portion of fines for Charge 3(b)—the charge based on the Invalid CMOH Orders, or alternatively on nothing at all, pursuant to the hearing tribunal’s admission—must be varied to \$0, and the portion of the fines for Charges 3(a) and 3(c)—the charges untethered to any College directive, by the hearing tribunal’s admission—must be varied to \$0.

- d. The \$1,000 fine imposed by the Penalties Order regarding Charge 4 must be varied as follows:

The portion of fines for Charge 4(c)—the charge based on the Invalid CMOH Orders, or alternatively on nothing at all, pursuant to the hearing tribunal’s admission—must be varied to \$0, and the portion of the fines for Charges 4(a) and 4(b)—the charges untethered to any College directive, by the hearing tribunal’s admission—must be varied to \$0.

- e. The \$5,000 fine imposed by the Penalties Order regarding Charge 5 must be varied as follows:

The portion of fines for Charge 5(a)—the charge based *directly* on the Invalid CMOH Orders—must be varied to \$0, and the portion of the fines for Charge 5(b)—the charge *indirectly* based on the Invalid CMOH Orders, which is to say the Pandemic Directive flowing therefrom—must be varied to \$0.

D. The Council must vary the costs portion of the Penalties Order, which is impacted both by the Invalid CMOH Orders and *Jinnah*

18. In Decision 2, the hearing tribunal ordered the Member to pay \$50,000 in costs (the “Costs Order”). The hearing tribunal justified the Costs Order by relying on two of the four exceptions to the presumption against any costs identified by the Court of Appeal in *Jinnah v Alberta Dental Association and College*, [2022 ABCA 336](#) [*Jinnah*], specifically, the seriousness of the unprofessional conduct and hearing misconduct.
19. No enforcement of costs against the Member is lawful a) in light of the Invalid CMOH Orders on which 11 of the sub-charges were based; b) given the remaining four sub-charges were admittedly based on nothing other than the hearing tribunal’s particular sensibilities; and c) with reference to the principles the Court of Appeal laid down in *Jinnah*.
20. For further certainty and with respect particularly to the principles of *Jinnah*, there can be no principled reason to enforce costs on the basis of the “seriousness” of the unprofessional conduct, when the “most serious charge” is invalid by virtue of the Invalid CMOH Orders.
21. Neither can there be any principled reason to enforce costs on the basis of “hearing misconduct” where the Member was obliged to defend himself against 15 out of 15 unfounded charges, 11 of which were based on an invalidated law and four of which were based, by the hearing tribunal’s own admission, on nothing except its whim.
22. Independent of whether the Costs Order was or was not lawful vis-à-vis the hearing tribunal’s attempt to apply *Jinnah*, it is unconscionable, unlawful, or, to use the language of section 93 of the *HPA*, “impossible” to enforce the costs portion of the Penalties Order in light of *Ingram*.

E. Conclusion

23. Section 93 exists precisely for the type of unique situation where, as in the present case, hearing tribunal orders or parts of hearing tribunal orders have become unlawful to carry out because the law on which they are based has subsequently been declared void by the

courts. The Council must not permit to be enforced fines and costs tethered to findings of unprofessional conduct based on invalidated laws. To do so would be a miscarriage of justice and undermines the rule of law.